Supreme Court, U. S.
FILED
NOV 21 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-839

LAWRENCE J. LEGUENNEC, individually and in his official capacity as Registrar of Voters, City and County of San Francisco; THOMAS J. MELLON, individually and in his official capacity as Chief Administrative Officer, City and County of San Francisco; CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,

Petitioners,

vs.

CHINESE FOR AFFIRMATIVE ACTION; SAN FRANCISCO COUNCIL, LEAGUE OF UNITED LATIN AMERICAN CITIZENS; LUE SHE TOM; TAK LAN CHAN HUEY; ROSE YUEN; NILSA M. MATOS, and MARIA DEL CARMEN MARRERO, on behalf of themselves and those similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE AGNOST
City Attorney

BURK E. DELVENTHAL
Deputy City Attorney

JUDITH L. TEICHMAN
Deputy City Attorney

206 City Hall
San Francisco, California 94102
Telephone: (415) 558-3731

Attorneys for Petitioners

THE JAMES H. BARRY CO., 170 SOUTH VAN NESS, SAN FRANCISCO CA. 94103

SUBJECT INDEX

	Page
Table of Authorities	iii
Opinion and Judgment Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	
I. The Law And Its Applicability To San Francisco	4
II. San Francisco's Efforts To Comply With The New Law In Time For The November 4, 1975 Election	7
III. Summary Of Proceedings In This Action	13
Argument	
I. Congress Does Not Have The Power Under Section 5 Of The Fourteenth Amendment To Require A State Or Its Political Subdivisions To Conduct Multilingual Elections Without A Finding Of Intentional Voting Discrimination And Solely To Remedy The Effects Of Unequal Educational Opportunities Not Found To Have Been Intentionally Imposed	16
II. Even If The Fourteenth Amendment Empowers Congress To Require States And Political Subdivisions To Provide Multilingual Assistance To Voters, It Must Exercise This Power So As Not To Interfere Unreasonably With The Powers Reserved To The States By The Tenth Amendment And The Substantial Interest A State May Have In Setting Policy Regarding The Number Of Languages In Which State And Local Elections Are Conducted	20

Page

III. Even If The Fourteenth Amendment Empowers Congress To Require States And Political Subdivisions To Provide Multilingual Assistance To Voters, Congress Acted Arbitrarily And Thus Unlawfully When It Adopted Legislation Requiring A Local Jurisdiction To Provide Written Election Materials In A Foreign Language In the Event That The Illiteracy Rate Of Persons Deemed To Be Members Of That Language Minority Group (As A Group) Is Higher Than The National Illiteracy Rate 31

IV. Congress Did Not Intend That A Jurisdiction Should Be Deemed To Have Violated The New Voting Rights Amendments When The Local Officials Were Acting In Good Faith But Had Not Had A Reasonable Time To Comply Fully With The New Law 32

Conclusion 35

TABLE OF AUTHORITIES

Cases *Page*

Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973 30
Castro v. State, 2 Cal.3d 223 (1970) 28, 29
Chinese for Affirmative Action v. Leguennec, 549 F2d 97 (9th Cir. 1978) 1, 33
Frontera v. Sindell, 422 F.2d 1215 (6th Cir. 1975) 30
Katzenbach v. Morgan, 384 U.S. 641 (1966) 22
Lassiter v. Northampton County Board of Election, 360 U.S. 45 (1950) 21
Lau v. Nichols, 414 U.S. 563 (1974) 6, 19, 20, 29
Mayor of City of Phila. v. Educational Equality League, 415 U.S. 605 (1974) 34
Millikin v. Bradley, 418 U.S. 717 (1975) 34
National League of Cities v. Ussery, 426 U.S. 833 (1976) 30
Oregon v. Mitchell, 400 U.S. 112 (1970) 22, 26
Rizzo v. Goode, 423 U.S. 362 (1976) 34
South Carolina v. Katzenbach, 383 U.S. 301 (1966) ... 22
United States of America v. City and County of San Francisco, et al., U.S. D.C., N.D. Cal., No. C-78-3521-CFP 25
University of California Regents v. Bakke, 98 S.Ct. 2733 (1978) 19, 20
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 16, 19, 20
Washington v. Davis, 426 U.S. 229 (1976) 16, 19, 20

United States Constitution

Fifteenth Amendment 17, 21, 22
Fourteenth Amendment 2, 16, 18, 19, 20, 21, 27, 31
Equal Protection Clause 16, 21, 22, 27, 28
Section 5 .....2, 16, 17, 20, 22, 30, 34
Tenth Amendment 2, 3, 21, 26, 30

Federal Statutes	Page
5 U.S.C. § 701 et seq.	2
8 U.S.C. § 1423	7
28 U.S.C. § 1331	2
§ 1343	2
§ 1357	2
§ 1361	2
§ 1254	2
§ 2403	15
42 U.S.C. § 1973 et seq.	3, 4, 5
§ 1973b	14, 21
§ 1973-aa-1a(a)	5, 17, 31
§ 1973aa-1a(b)	3, 5, 14, 23
§ 1973aa-1a(e)	6
§ 1973aa—2(b)	5, 6
Title VI of the Civil Rights Act of 1964	6, 19, 29
Voting Rights Act of 1965	2, 4, 17, 21, 25
Voting Rights Act Amendments of 1975	2, 3, 4, 7, 8, 14
Title I	4
Title II	4, 17
Title III	4, 15, 17, 18, 20, 21, 22, 29, 31, 34

California Constitution and Statutes

Constitution	
Article 2, Section 1	6
Education Code § 30	6, 7
§ 48200	6
Elections Code § 302(c)	16
§ 302(d)	16
§ 1635(b)	16
§ 1635(c)	11, 16
§ 1635(d)	16
Statutes of 1975, Ch. 704	12

Federal Regulations and Notices	Page
28 C.F.R. § 55.1 et seq.	22, 30
§ 55.2(b)	24
§ 55.15	23
§ 55.19	24
§ 55.20	23
40 F.R. 41827	6
41 F.R. 29998	30

Court Rules

Supreme Court Rule 19.1(b)	2

Other Authorities

H.REP. No. 94-196, 94th Cong., 1st Sess. (1975)	4, 18
U.S. Department of Commerce, Current Population Reports, Series P.25, No. 627	5, 6
U.S. Department of Commerce, General Social and Economic Characteristics California, Table 81	7
U.S. Department of Commerce, Subject Report P.C. (2)-1G, "Japanese, Chinese and Filipino in the United States"	5

INDEX TO APPENDICES

Appendix A. Chinese for Affirmative Action, et al. v. Leguennec, et al., 549 F.2d 97 (9th Cir. 1977)	A—1
Appendix B. Chinese for Affirmative Action, et al., v. Leguennec, et al., U.S.D.C., N.D. Cal. December 1976	B—1
Appendix C. Complaint, United States of America v. City and County of San Francisco, et al., U.S.D.C., N.D. Cal., No. C-78-3512-CFP	C—1

In the Supreme Court of the United States

OCTOBER TERM, 1978

No.

LAWRENCE J. LEGUENNEC, ET AL., *Petitioners,*

vs.

CHINESE FOR AFFIRMATIVE ACTION, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 23, 1978.

OPINION AND JUDGMENT BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 549 F.2d 97 (9th Cir. 1978) and is printed as Appendix A hereto. The Order and Findings of the District Court (CT 212) were unreported, but are printed as Appendix B hereto.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals was entered on August 23, 1978.

Jurisdiction of the District Court was alleged under 28 U.S.C. §§ 1331, 1343, 1357, 1361, and 5 U.S.C. §§ 701 *et seq.* (CT 2)

This Court's jurisdiction is based on 28 U.S.C. § 1254(1) and Rule 19.1(b).

QUESTIONS PRESENTED

1. Does Congress have the power under Section 5 of the Fourteenth Amendment to require a State or its political subdivisions to conduct multilingual elections without a finding of intentional discrimination and solely to remedy the effects of unequal educational opportunities not found to have been intentionally imposed.

2. Even if the Fourteenth Amendment empowers Congress to require States and political subdivisions to provide multilingual assistance to voters, can Congress exercise this power so as to unreasonably interfere with the powers reserved to the States by the Tenth Amendment and the substantial interest a State may have in setting policy regarding the number of languages in which State and local elections shall be conducted.

3. Did Congress act arbitrarily and thus unlawfully when it adopted legislation requiring a local jurisdiction to provide *written* election materials in a foreign language in the event that the illiteracy rate of persons deemed to be members of that language group (as a group) is higher than the national illiteracy rate.

4. Did Congress intend that a jurisdiction should be deemed to have violated the 1975 Voting Rights Act Amendments when the local officials were acting in good faith but had not had a reasonable time to comply fully with the new law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Voting Rights Act Amendments of 1975, Title 42 U.S.C. §§ 1973 *et seq.*[1] The particular section involved here is Title 42 U.S.C. § 1973aa-1a(a) and (b) which provides:

> (a) The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.
>
> (b) Prior to August 6, 1985, no State or political subdivision shall provide registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language if the Director of the Census determines (i) that more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and (ii) that the illiteracy rate of such persons as a group is higher than the national illiteracy rate:

1. Pub. L. 89-110, Title II, § 203 as added Pub. L. 94-73, Title III, § 301, August 6, 1975, 89 Stat. 402.

Provided, That the prohibitions of this subsection shall not apply in any political subdivision which has less than five percent voting age citizens of each language minority which comprises over five percent of the statewide population of voting age citizens. For purposes of this subsection, illiteracy means the failure to complete the fifth primary grade. The determinations of the Director of the Census under this subsection shall be effective upon publication in the Federal Register and shall not be subject to review in any court.

STATEMENT OF THE CASE

I. The Law And Its Applicability To San Francisco.

On August 6, 1975, President Nixon signed into law amendments to the Voting Rights Act of 1965 which mandate multilingual elections under specified circumstances.[2] As amended the Act provides in pertinent part:

> "Prior to August 6, 1985, no State or political subdivision shall provide registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language if the Director of the Census determines (i) that more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and (ii) that the illiteracy rate of such persons as a group is higher than the national illiteracy rate. * * * " 42 U.S.C. §1973aa-1a(b).

2. Title I of the Voting Rights Act Amendments of 1975 extended the Voting Rights Act of 1965. Titles II and III expand the Act to require foreign language materials and assistance for covered "language minority citizens." The primary distinction between Titles II and III is that Title II applies to those jurisdictions where less than 50% of the electors registered or voted in the most recent presidential election. A jurisdiction covered under Title II is required to preclear all voting changes with the Department of Justice and Federal examiners and observers may be designated to serve in the covered areas. The premise on which the additional Title II requirements are based is that the low participation in the election process is due to discrimination in the election system. H.REP. No. 94-196, 94th Cong., 1st Sess. (1975), p. 30.

A "language minority group" is defined to include *any* persons who are "American Indian, Asian American, Alaskan Natives, or of Spanish heritage." 42 U.S.C. §1973aa-1a(e). "Illiteracy" means the failure to complete the fifth primary grade in any school. 42 U.S.C. §1973aa-1a(b). The national illiteracy rate for voting age citizens is 4.6%.[3]

For purposes of these multilingual voting rights requirements, the Director of the Census has determined that a person is deemed to be Chinese and a member of the Chinese language minority group if the person identified himself or herself as Chinese in the 1970 census.[4] The Director of the Census deems a person to be of Spanish heritage and thus a member of the Spanish language minority group if in the 1970 census the person was recorded as having Spanish as a mother tongue, or as living in a family in which the head or wife was reported as having Spanish as a mother tongue, or as having a Spanish surname.[5] The determinations of the Director of the Census "shall not be subject to review in any court." 42 U.S.C. § 1973-aa-1a(b).

The amendments became effective as to San Francisco on September 9, 1975, when the Director of Census published his determination that San Francisco is covered by the multilingual requirements for Spanish and Chinese minority language persons.[6] This deter-

3. U.S. Department of Commerce, *Current Population Reports*, Series P.25, No. 627, p. 1.

4. According to U.S. Department of Commerce, *Subject Report* P.C.(2)-1G, "Japanese, Chinese and Filipino in the United States," App. 5-6, for purposes of the 1970 Census, persons were determined to be Chinese language minority persons if they identified themselves as being Chinese in answering a question which asked the respondent to circle the appropriate racial description.

5. *Current Population Reports, supra.* pp. 1-2.

6. In its opinion in this case the Ninth Circuit stated that, "[O]n September 3, 1975, the Director of the Census designated San Francisco as a political subdivision covered by § 1973aa-1a(b)." Opinion, p. 2, Appendix

mination was based on the fact that of the 495,519 citizens 18 years old and over residing in San Francisco at the time of the 1970 census, 5.07% (25,038) were Chinese and 8.9% (43,859) were of Spanish heritage. Of the Chinese, 15.7% (3,941) had failed to complete the fifth primary grade, and of the Spanish, 6.7% (2,920) had failed to complete the fifth primary grade.[7]

In order to vote in California a person must be "a United States citizen, 18 years of age and resident in this state." California Constitution, Article 2, Section 1. There are very few voting age citizens who do not have at least a minimal ability to read and speak English since almost all United States citizens have either been subject to compulsory education in schools where the basic language of instruction is English, or they have been required to demonstrate literacy in English to qualify for citizenship.

In California, full-time education is compulsory for children between the ages of six and sixteen. Cal. Education Code § 48200. English is the basic language of instruction for children in California schools.[8] Cal. Ed-

A. In fact, the determination by the Director of the Bureau of the Census was *dated* September 3, 1975, but was not actually published in the Federal Register until September 9, 1975. 40 F.R. 41827. Under 42 U.S.C. §1973aa-2(b), "The determinations of the Director of the Census . . . shall be effective upon *publication* in the Federal Register. . . ." [Emphasis added.]

7. *Current Population Reports, supra*, p .5.

8. In *Lau* v. *Nichols*, 414 U.S. 569 (1974), an HEW condition on federal financial assistance which required that San Francisco provide English language instruction for minority language children was upheld as within the scope of power granted to HEW under Title VI of the Civil Rights Act of 1964. Writing for the Court, Mr. Justice Douglas opined that:

> ". . . those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful." 414 U.S. at 566.

Surely this is an overstatement. Some English would be learned in the educational process even if the process was not as meaningful as it might have been had the child been fluent in English. In a concurring opinion Mr. Justice Blackmun, who was joined by the Chief Justice, cautions against interpreting the judgment too broadly and notes that "earlier generations of American ethnic groups have overcome the language barrier. . . ." 414 U.S. at 572.

ucation Code § 30. These requirements are typical throughout the United States.[9]

In order to become a naturalized citizen, under Federal naturalization law one must "demonstrate an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language." 8 U.S.C. § 1423. The only relevant exception contained in this section is for any person who, on the effective date of this chapter, is over fifty years of age and has been living in the United States for periods totaling at least twenty years. This English literacy provision was enacted on June 27, 1952. Thus the only naturalized citizens affected by the Voting Rights Act Amendments who have not demonstrated literacy in English are the handful who lived in this country for at least twenty years *prior* to mid-1952. These citizens are now at least 76 years of age.

II. San Francisco's Efforts To Comply With The New Law In Time For The November 4, 1975 Election.

The President signed the Voting Rights Act Amendments on August 6, 1975; the Director of the Census designated San Francisco as being covered by the amendments for *both* the Chinese and Spanish languages on September 9; and San Francisco held a major municipal election on November 4. During a substantial portion of this period, from August 18 to September 21, the City was attempting to exist with and settle a strike of police officers and firefighters. The November election was important in that the Mayor and six of the eleven members of the Board of Super-

9. The only significant exception is Puerto Rico where people of voting age today may have been instructed in Spanish rather than English. In the 1970 Census, however, out of a *total* San Francisco population of 715,673, there were only 3,667 (0.5%) persons of any age of Puerto Rican birth or parentage. U.S. Department of Commerce, *General Social and Economic Characteristics California*, Table 81.

visors were running for election. There were also 19 propositions on the ballot.

On August 6, the day the President signed the amendments, the Mayor assigned his Economic Analysis Unit to provide assistance to the Registrar of Voters [Registrar] in developing a plan for complying with the multilingual voting requirements. The task included studying precisely how election material in Spanish and Chinese could be provided for the November 1975 election and preparing cost estimates and suggested procedures for providing it.[10]

The Chief Administrative officer announced the City's plan for a multilingual November election on September 2, 1975—in the middle of the police and fire strike, less than a month after the Voting Rights Act Amendments were signed by the President, and a week *before* the Director of Census published his September 9 determination that San Francisco was covered for the Spanish and Chinese languages. The plan was prepared and released in the context of both adverse public reaction to the multilingual election requirements based at least in part on anticipated cost, and concern by the language minority community that the City would not comply fully with the new law. One of the purposes in releasing the plan was to defuse the concontroversy over the multilingual election requirement by settling unfounded rumors.[11] This action is a prime example of the City's good faith in attempting to comply fully with the law at the earliest date possible.

Prior to a multi-issue election the San Francisco Registrar of Voters mails to registered voters a sample

10. Affidavit of R. Dan Gardner, Director, Economic Analysis Unit, paragraph 1, part of the motion for summary judgment noted at CT 113, but transmitted separately.

11. See paragraph 2 of Mellon's letter to the Board of Supervisors transmitting the plan, dated September 2, 1975, and appearing at CT 45.

ballot which is a facsimile of the ballot as it appears on the voting machine and a voter information handbook containing arguments and statements. On about September 3, 1975, the City let contracts for the very delicate job of translating and printing the sample ballot and the voter information handbook for the November election. San Francisco's voter information handbook and sample ballot for the November election consisted of 184 pages in English, 168 pages in Chinese and 249 in Spanish.[12] The City's goal was to have the handbooks and sample ballots available for the October 6 opening of absentee balloting.[13] Absentee ballots and voting instructions were also available in Spanish, Chinese and English for the November election.[14]

The Registrar made extensive efforts to recruit persons bilingual in English and Spanish, Cantonese or Mandarin to serve as election officials for the November election. As part of a "notice of inquiry" which will be described below, the Registrar mailed to all registered voters a notice in September which, among other things, asked bilingual voters to call or come by the Registrar of Voter's office if they were willing and able to serve as election officials. In addition, the need for bilingual election officials was publicized through several press releases in English, Spanish and Chinese and members of the Human Rights Commission staff also publicized the need among both public and private community organizations. Over 175 additional bilingual election workers were recruited as a result of these efforts. Those who spoke Cantonese, Mandarin or

12. Copies of the sample ballot and handbooks in these three languages appear as Exhibit 3 to City defendants' memorandum in opposition to plaintiffs' motion for an order shortening time for discovery, noted at CT 31 but transmitted separately.

13. See the Affidavit of Quinn, paragraph 3, noted at CT 113 but transmitted separately.

14. Affidavit of Quinn, paragraph 23, noted at CT 113 but transmitted separately.

Spanish were assigned to precincts in which there were concentrations of persons of Spanish or Chinese origin.[15]

The Registrar attempted to reach the minority language community with information relating to voter registration and the availability of election materials and assistance at the polling places through English, Spanish and Chinese language press releases distributed to the minority language media and neighborhood newspapers as well as to the dominant English-speaking radio and television stations and newspapers.[16]

Instructions in the use of the voting machines were placed on each machine used in the November election in English, Spanish and Chinese. There was no space for translations of the labels identifying the items to be voted upon, however, so the labels used on the voting machines contained the given name of candidates for office and English words were used to describe the candidate's occupation and the titles of the propositions. The voter unable to read English was permitted to take up to two persons with him into the voting booth. In addition, voters were allowed to take into the voting booth a sample ballot which was a facsimile of the machine face with its labels but written in Spanish and Chinese, and a selector card which was available in Spanish and Chinese as well as English. The selector card was mailed with the sample ballot and voter handbook and summarized the ballot choices. The card was to be marked in advance and taken into the voting booth to enable the voter to match given names of candidates for office and the letter designations for the propositions appearing on the machine. In view of the

---

15. See Affidavit of Quinn, paragraphs 11 and 12 and Affidavit of Grant Mickins, noted at CT 113 but transmitted separately.

16. See the Affidavit of Quinn, paragraphs 21 and 22 and the Affidavit of Grant Mickins, noted at CT 113 but transmitted separately.

typically long ballot in San Francisco, many English-speaking voters cast their ballot using the selector card as a guide.[17]

In planning for multilingual elections in San Francisco, the City officials decided to identify the persons who desired either oral assistance in Spanish, Cantonese, Mandarin, or Tagalog (a Filipino dialect)[18] or written assistance in Spanish or Chinese, and to serve these people specifically while avoiding the enormous cost and waste of providing trilingual election materials and information to all persons registered to vote. To this end a "notice of inquiry" written in four languages was mailed to all registered voters asking those who desired bilingual assistance or information to make a check mark in the appropriate box and to return the enclosed self-addressed, postage-paid postcard.[19] The notice of inquiry generated a return of about 1400 requests for Chinese or Spanish election materials.[20]

The City made other efforts to reach persons who needed election materials in Spanish or Chinese. Sample ballots were mailed to all voters in English, Chinese and Spanish. The English version of the voter infor-

---

17. Affidavit of Quinn, paragraphs 13 and 14, noted at CT 31 but transmitted separately.

18. Oral assistance in Tagalog was included to comply with a State law requiring "appropriate efforts . . . to minimize obstacles to voting by citizens who lack sufficient skill in English to vote without assistance." Cal. Elections Code § 1635(c).

19. This correspondence appears as Exhibit 2 to Defendants' opposition to shortening time, noted at CT 31 but transmitted separately; see also the Affidavit of Quinn, paragraphs 4 and 5, noted at CT 113 but transmitted separately.

20. There were 783 requests for written information in Chinese and 580 in Spanish. The requests for oral assistance were: Cantonese, 362; Mandarin, 34; Spanish, 208; and Tagalog, 70. CT 186-187. The difference in the cost between sending 600 pages of voter handbooks in three languages to all of San Francisco's registered voters, and sending a handbook in English to all with one in Spanish or one in Chinese to the persons who requested it is obvious. The cost of compliance for the November election was estimated at $125,000. (CT 51)

mation handbook contained on the inside cover a note in Spanish, Chinese and English indicating that the handbook was available at the Registrar's Office. Handbooks in Chinese and Spanish were distributed in the neighborhoods having concentrations of Spanish and Chinese origin persons. And, finally, the sample ballot in all three languages was posted at the polling places and there was a poster at the polling places indicating that written materials (referring to the ballots and handbooks) were available in English, Spanish and Chinese.[21]

Voter registration for the November 4, 1975 election closed on October 5, 1975. No effort was made to provide multilingual registration materials for the election since, as a practical matter, there was simply not enough time between the effective date of the 1975 Amendments, September 9 and October 5, when registration closed, to get the voter registration forms printed in Spanish and Chinese and distributed to the volunteers (primarily from interest groups) who traditionally conduct most of the voter registration effort in San Francisco. Futhermore, after mid-September it became an administrative necessity to delay purchasing trilingual registration affidavits because a statute authorizing postcard registration for Californians beginning July 1, 1976 was enacted.[22]

There were additional administrative reasons for not providing a trilingual version of the registration affidavit then in use. The print on the present affidavit was so crowded that the affidavit could not be published in two or three languages without either eliminating some of the questions (most of which were required by

21. Affidavit of Quinn, paragraphs 7 and 9 and Affidavit of Mickens, paragraph 7, noted at CT 113 but transmitted separately.

22. Ch. 704 of the California Statutes of 1975 was signed by the Governor on September 15, 1975.

State law), reducing the size of the print to an unreadable size, or changing the size of the form.[23]

Since it was not an acceptable adjustment to reduce the size of the print on the current affidavit, or to leave off items required by State law, or to convert to a different size form until the State converted to a postcard registration form, or to have affidavits solely in Spanish or Chinese, it was decided to wait and adopt new registration affidavits in Chinese and Spanish on a form identical to the one which it was anticipated would be adopted early in 1976 by the Secretary of State for postcard registration. It was anticipated that adoption of the form would be in sufficient time to allow for purchase of trilingual registration forms for the voter registration activity that would pecede the June 1976 primary.[24]

III. Summary Of The Proceedings In This Action.

The complaint in this case was filed on October 21, 1975, six weeks after the effective date of the multilingual voting requirements. (CT 1) The Chinese and Spanish American plaintiffs sought declaratory and injunctive relief against both the City defendants and the United States Attorney General and the Assistant Attorney General for Civil Rights for alleged violations of their rights under the Voting Rights Act Amendments. (CT 1-31)

On November 17, 1975, the City defendants filed a motion to dismiss the action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (CT 75)

23. A copy of the registration affidavit appears as Exhibit 5 to defendants' opposition to shortening time, noted at CT 31 but transmitted separately.

24. Affidavit of Leguennec, page 3, noted at CT 31 but transmitted separately. Affidavit of Quinn, paragraph 19, noted at CT 113 but transmitted separately and Supplementary Affidavit of Quinn, page 2, CT 183.

Subsequently, on November 26, the City defendants also filed a motion for summary judgment.[25] Following extensive briefing and oral argument the District Court dismissed the action in its entirety as "premature," but without prejudice. (CT 212) Although there was no motion to dismiss by the Federal defendants on file, an oral motion made at the hearing on the City defendants' motion was also granted by the District Court. That order provides in relevant part:

> "The Court now finds as follows:
>
> "1. There has been no indication that defendants are acting in other than good faith; and
>
> "2 The public interest requires that defendants be given a reasonable period of time to meet the requirements of the law in a reasonable fashion . . . ." Appendix B

Thereafter the plaintiffs filed their notice of appeal. (CT 216)

On appeal the case was briefed and argued primarily on the opposing claims of the plaintiffs and the City defendants over whether the action was premature and whether the City was in compliance with the Voting Rights Act Amendments. The appeal was not perfected as against the Federal defendants.

The Ninth Circuit vacated the District Court order and remanded the case for further proceedings. It observed in its opinion that:

> "The determination, in early September, that the city was subject to § 1973aa-1a(b) left the city only a few days in which to make the contracts and accomplish the changes necessary to modify its election procedures to comply with the Act before the November elections. However, shortage of time will not necessarily shield election officials

25. Non-reproducible document, see CT 113.

> from the diligent assertion of rights under the Act. It is Congress's intention to eradicate voting discrimination with all possible speed. *Briscoe* v. *Bell*, 432 U.S. 404, 410 (1977). The law imposes a duty on parties having grievances based on discriminatory practices to bring their complaints forward for preelection adjudication. *Toney* v. *White* 488 F.2d 310, 314 (5th Cir. 1973). Therefore, the complaint was not 'premature,' even though it may have been highly inconvenient. The city could have been protected by the conditions of any injunction from unreasonable or impossible burdens." Appendix A, p. 2.

The constitutionality of the multilingual election requirements is being raised for the first time in this Petition for a Writ of Certiorari. As evidenced by the very significant efforts the City made to comply with the requirements when first enacted, the City chose initially to comply with the new law rather than challenge its legality. However, passage of "Proposition 13" and the movement for tax reform which began in California and is now being considered across the nation have placed local governments in a very difficult situation. Every expenditure of public funds not absolutely mandated by law is being re-examined and evaluated in terms of its social utility. Where the City is considering the closure of hospitals and fire stations and cutting back on other public services essential to the health, welfare and safety of its residents it needs to know whether it *must* expend money to conduct multilingual elections or whether this item of expense may be weighed against others.

Because the constitutionality of Title III of the Voting Rights Act Amendments of 1975 are in issue the provisions of 28 U.S.C § 2403 may be applicable. No court has certified to the Attorney General the fact that the constitutionality of an Act of Congress has

been drawn into question in this case. The Attorney General has participated in the case, however, as a defendant in the District Court and as an Amicus Curiae in the Ninth Circuit.

ARGUMENT

I. Congress Does Not Have The Power Under Section 5 Of The Fourteenth Amendment To Require A State Or Its Political Subdivisions To Conduct Multilingual Elections Without A Finding Of Intentional Voting Discrimination And Solely To Remedy The Effects Of Unequal Educational Opportunities Not Found To Have Been Intentionally Imposed.

The instant case presents the issue of whether Congress has the power under Section 5 of the Fourteenth Amendment to require a state or political subdivision to conduct multilingual elections where there has been no finding of intentional voting discrimination[26] and where the sole reason given is the need to remedy the effects of unequal educational opportunities for language minorities which also were not found to have been intentionally imposed.

It is now well established that the Equal Protection Clause of the Fourteenth Amendment proscribes only invidious, intentional discrimination. *Washington* v. *Davis*, 426 U.S. 229, at 238-48 (1976) (employment tests which had a disparate racial impact did not establish a violation of the Equal Protection Clause absent a racially discriminatory purpose); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (same as to the denial of a zoning variance to permit a low and moderate income

26. In fact, in California there are statutes which require the counties to make efforts to provide bilingual assistance in registration and voting to persons who lack sufficient skills in English to register or vote without assistance. California Elections Code § 302(c) and (d) and § 1635(b), (c) and (d).

housing project). Therefore, Congress in enacting legislation to remedy Fourteenth Amendment violations pursuant to its power under Section 5 of the Fourteenth Amendment must be acting on the basis of a finding, either express or capable of being inferred, that the jurisdictions subject to its regulation have, in fact, committed intentional and therefor unconstitutional discrimination.

In enacting Title III of the 1975 Amendments to the Voting Rights Act Congress made no finding that the legislation was necessary to eliminate or to prevent intentional discrimination in the election system. Congress's findings are set forth in 42 U.S.C. § 1973aa-1a(a) which provides:

> "The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, *the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them*, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices and by prescribing other remedial devices." [Emphasis added].

The distinction between Title II with its more exacting requirement (not applicable to San Francisco) that the Department of Justice preclear any change in the election system of a covered jurisdiction and Title III is described in the House Committee on the Judiciary Report on the legislation:[27]

27. The various titles in the Voting Rights Act Amendments of 1975 are described in footnote 2 on p. 4.

> "Title III of H.R. 6219, like Title II, seeks to enfranchise citizens of four language minority groups (persons of Spanish heritage, Asian Americans, American Indians, and Alaskan natives) which have been excluded from the electoral process because of their inability to speak, write, or understand English. The line between Title II and Title III is based on the severity of voting discrimination against such language minorities. The evidence before the Committee demonstrates that the voting problems of language minority groups are not uniform in all parts of the country. That evidentiary record is reflected in the different findings made under the two titles. *The less stringent provisions of Title III are based largely on the unequal educational opportunities which language minorities have suffered at the hands of state and local officials.* In contrast, *the more severe remedies of Title II are premised not only on educational disparities, but also on evidence that language minorities have been subjected to 'physical, economical, and political intimidation' when they seek to participate in the electoral process.*" H. REP. No. 94-196, 94th Cong., 1st Sess. (1975) pp. 29-30. [Emphasis added.]

Thus the Legislative findings on which the statute is based make it clear that in adopting Title III Congress was imposing a duty on jurisdictions which had not been found by Congress to have intentionally denied the right to vote to any racial or other group. Rather, Congress sought to remedy unequal educational opportunities which language-minority children have experienced in the educational process due to the school's failure to provide bilingual education. H.REP. No. 94-196, *supra*, pp. 25-26. And even the educational deprivation was not treated as intentional and thus could not have been a violation of the Fourteenth Amendment. The central issue then is under which

circumstances may Congress, pursuant to its Fourteenth Amendment enforcement powers, impose affirmative obligations on the state's administration of their elections to remedy unequal educational opportunities which themselves were not violations of the Fourteenth Amendment.

Although Congress may legislate on the basis of less than conclusive proof of intentional, invidious discrimination, it is not free to enact measures under the Fourteenth Amendment which are merely desirable. They must be aimed at eliminating or preventing intentional, invidious discrimination. This conclusion is based on this Court's holdings in *Washington* v. *Davis* and in *Arlington Heights*, discussed above, that a state does not violate the equal protection rights of its citizens merely because a state law or procedure fairly and rationally conceived adversely affects some identifiable minority.

In *University of California Regents* v. *Bakke*, 98 S.Ct. 2733 (1978), Mr. Justice Powell commented as follows on the scope of Title VI of the Civil Rights Act of 1964:

> "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment." 98 S. Ct. at 2747.

Lau v. *Nichols*, 414 U.S. 563 (1974), does not require a different result. *Lau* upheld a requirement under Title VI of the Civil Rights Act of 1964 that a local jurisdiction provide materials or instructions in other than English where necessary to assure more equal opportunities for language minority children. There was no finding of intentional deprivation.

Writing for himself and three other members of the

Bakke Court, Mr. Justice Brennan discussed this theme further and in doing so he cast doubts on the continuing vitality of the *Lau* analysis and result:

> "We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. *Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's we have serious doubts concerning the correctness of what appears to be the premise of that decision. . . .*" [Emphasis added.] 98 S.Ct. at 2780.

Implicit in this comment is the proposition that Congress' power is limited to prohibiting and prescribing under Section 5 of the Fourteenth Amendment remedies for intentional discrimination prohibited by the Fourteenth Amendment.

In the instant case the only justification for enactment of the requirements in Title III suggested by either the legislation or the legislative history was a history of unequal educational opportunities not invidious by or intentionally imposed. In view of *Washington* v. *Davis*, and *Arlington Heights*, *supra*, it is now clear that Congress was acting in excess of its authority in enacting Title III of the Voting Rights Act Amendments of 1975.

II. Even If The Fourteenth Amendment Empowers Congress To Require States And Political Subdivisions To Provide Multilingual Assistance To Voters, It Must Exercise This Power So As Not To Interfere Unreasonably With The Powers Reserved To The States By The Tenth Amendment And The Substantial Interest A State May Have In Setting Policy Regarding The Number Of Languages In Which State And Local Elections Are Conducted.

The City believes that a line must be drawn between the powers of Congress under the Fourteenth Amendment and the powers reserved to the states under the Tenth Amendment;[28] and that even if Congress had authority to enact bilingual voting requirements, Title III of the Voting Rights Amendments and the interpretive guidelines under it interfere unnecessarily with the rights of a state to regulate its own elections and to chose the primary language in which they are conducted.

Congress' attempt to require multilingual elections arises as an extension of the ban on literacy tests. In *Lassiter* v. *Northampton County Board of Election*, 360 U.S. 45 (1950), the Court held that in the absence of proof that it was being used for discriminatory purposes or being applied in a discriminatory fashion, the State of North Carolina did not violate the Fourteenth Amendment in imposing a literacy test which was fair on its face. Literacy tests were subsequently banned through provisions in the original Voting Rights Act of 1965 and amendments thereto. In each instance the Court upheld the ban on the basis of either Congressional power to enact legislation under the Fifteenth Amendment, which prohibits racial discrimination in voting, or under the Equal Protection Clause of the Fourteenth Amendment.[29]

---

28. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

29. The original Voting Rights Act of 1965 suspended literacy and other voting tests in states and political subdivisions where less than 50% of the voting-age residents were registered to vote or voted in the presidential election of 1964. 42 U.S.C. § 1973b. This ban was upheld under the Fif-

It does not follow from the fact that Congress has the power to ban literacy tests, however, that Congress also has the power to require the conduct of all aspects of elections in multiple languages. An election conducted solely in English may make it more difficult for persons who are not fluent in English to vote, but it does not operate as an absolute bar to their voting as does a literacy test. The more narrow question then is whether Congress may, consistent with the powers reserved to the States, require State and local jurisdictions to conduct multilingual elections to the extent required by Title III and the Department of Justice guidelines adopted under it.

Title III and the interpretive guidelines promulgated by the Department of Justice[30] illustrate the complexity of running an election, the degree to which the Department of Justice as the policing organ for the Federal government must necessarily get involved in decisions affecting the running of the election in determining what is compliance with the multilingual election requirements, and the degree to which the multilingual requirements affect the conduct of an election.

The Act itself provides that the multilingual requirements apply to the provision of

> "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots." 42 U.S.C. § 1973aa-1a(b).

In its interpretive guidelines the Department of Justice warns with reference to this language that it

> "should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections, including, for example the issuance, at any time during the year, of notifications, announcements, or other informational materials concerning the opportunity to register, the deadline for voter registration, the time, places and subject matters of elections, and the absentee voting process." 28 C.F.R. § 55.15.

Application of these multilingual election requirements is particularly complex in San Francisco where the statute requires assistance to Chinese speaking citizens. Although there is only one written language, there are a number of dialects. Most San Franciscans who speak Chinese either speak Cantonese or Mandarin. In this connection the Department of Juctice warns that it is the obligation of the local jurisdiction

> "to ascertain the dialects that are commonly used by members of the applicable language minority group in the jurisdiction and to provide oral assistance in such dialects." 28 C.F.R. § 55.20.

Section 55.20(c) goes into detail regarding the use of interpreters, or "helpers" as they are called:

> "With respect to the conduct of elections, the local jurisdiction will need to determine the number of helpers (*i.e.*, persons to provide oral assistance in the minority language) that must be provided. In evaluating the provision of assistance, the Attorney General will consider such facts as the number of a precinct's registered voters who are members of the applicable language minority

---

teenth Amendment in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). The 1965 legislation also provided that no person who had successfully completed the sixth primary grade in a school within the territorial jurisdiction of the United States in which the language of instruction was other than English, *i.e.*, what are commonly referred to as "American flag schools" in Puerto Rico, could be denied the right to vote because of his inability to read or write English. In *Katzenbach* v. *Morgan* 384 U.S. 641 (1966), this provision was upheld as within Congress' enforcement power under Section 5 of the Fourteenth Amendment on, among other grounds, the need to remedy the effects of past discrimination. In 1970 Congress amended the Act and suspended for 5 years all literacy tests everywhere in the United States. This action was upheld by the Court in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), under the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment.

30. They appear at 41 F.R. 29998, 28 C.F.R. § 55.1 *et seq.*

> group, the number of such persons who are not proficient in English, and the ability of a voter to be assisted by a person of his own choice. The basic standard is one of effectiveness."

Written election materials raise translation problems. Since there is often a difference between the language in common use and the formal language, and because words cannot always be translated on a one for one basis, questions of the accuracy and completeness and the effectiveness of a translation may arise. In 28 C.F.R. § 55.2(b), the Department of Justice states that one of the two basic standards which will be applied by the Attorney General in measuring compliance with the multilingual voting requirement is

> "that materials and assistance should be provided in a way designed to allow members of applicable language minority groups to be *effectively informed of and participate effectively* in voting-connected activities. . . ." [Emphasis added.]

In the provisions relating specifically to the accuracy and completeness of written materials the guidelines provide that

> "the Attorney General will consider whether the jurisdiction has consulted with members of the applicable language minority group with respect to the translation of materials." 28 C.F.R. § 55.19(b).

The problems arising from differences within a single language are often impossible to resolve very satisfactorily. In San Francisco there is a diverse, heterogeneous Spanish speaking population with people coming from all countries in Latin America, from Mexico to the Tierra del Fuego. Each has its own political system and institutions. How, for example, does a translator render in Spanish the office of the "City Attorney" when such an office simply does not exist in

most Latin-American (civil law) countries, and where there is some equivalent it inevitably has six different names in six different countries.

The interest of a State and its political subdivisions in limiting the multilingual aspects of the election system is evident from even this incomplete review of the problems inherent in a multilingual election system. The most eloquent description of the level of involvement in local affairs by the federal government which may flow from the multilingual voting requirements appears in paragraph "b" of the prayer for relief in a new suit against San Francisco under the Voting Rights Act Amendments filed by the *Attorney General* on October 27, 1978. *United States of America* v. *City and County of San Francisco, et al.*, U.S. D.C., N.D. Cal., No. C-78-3521-CFP.[31] It includes everything from requiring the City to develop a glossary of key election-related words in English and applicable minority languages for election officials (sub-para. 4), to establishing a "cooperative working relationship between the office of the Registrar and community groups in language minority communities" (sub-para. 7), and to providing "community groups interested in voter registration, access to addressees of all *unregistered residences*" (sub-para. 8, emphasis added). What is most significant about this prayer is that it does not depart in substantial degree from what Title III and the interpretive guidelines purport to require.

This federal involvement in the conduct of elections constitutes a serious displacement by the federal government of a state's power to order its own affairs and set priorities for the allocation of limited human and fiscal resources to deal with an infinite number of prob-

---

31. A copy of the complaint appears as Appendix C hereto. Paragraph (b) begins on p. 6.

lems. A state's decision to conduct its elections primarily in English must be recognized as a considered judgment by the people of that state through their elected and appointed officials of how best to administer a basic institution in a democratic society, the electoral process.

The most analagous attempt by Congress to regulate the conduct of elections in recent years was the attempt to lower the minimum voting age in state and local elections from 21 to 18. This legislation was struck down in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). The plurality opinion upheld the power of Congress to lower the voting age in federal elections while overruling the attempted exercise by Congress of the power to regulate age limits in state elections. In concluding that it was beyond the reach of Congress to impose a lower minimum voting age on state and local elections Mr. Justice Black observed in a separate opinion:

> "[T]he Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother Harlan has persuasively demonstrated that the framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections. 400 U.S. at 124-25; [footnote omitted]
>
> * * * *
>
> "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices, *and the nature of their own machinery for filling local public offices.* [400 U.S. at 125; emphasis added, citations omitted]
>
> * * * *
>
> "In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history. [400 U.S. at 126]
>
> * * * *
>
> "While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discriminations other than those on account of race, [footnote and citations omitted] it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves." 400 U.S. at 127-8.

In another separate opinion Mr. Justice Harlan dissented from the result of the decision that Congress could reduce the minimum age for voting in federal elections stating that:

> "It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress. The reason for the scheme is not hard to find. In the Constitutional Convention, Madison expressed the view that: 'The qualifications of electors and elected were fundamental articles in a Republican Govt and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution.' 2 M. Farrand. Records of the Federal Convention of 1787, pp. 249-250 (1911)." 400 U.S. at 210-11.

In short, it is one thing for Congress acting under the Equal Protection Clause of the Fourteenth Amendment to prohibit the imposition of a literacy requirement which absolutely precludes a person who has received an inferior education because of an inadequate educational system from exercising his or her fundamental right to vote. It is an entirely different thing for Congress to attempt to burden the electoral system with the conduct of totally multilingual elections in order to compensate for disabilities which do not preclude participation in the election process and which are not imposed for discriminatory reasons.

An English literacy requirement in California was struck down in 1970 by the California Supreme Court in *Castro* v. *State*, 2 Cal.3d 223 (1970). The California Supreme Court upheld the constitutionality of English-only elections, however. The California Court concluded, as should this Court:

> "It is clear that the goal of efficient and inexpensive administration, while praiseworthy, cannot justify depriving citizens of fundamental rights. But this does not imply that the state must not only provide all qualified citizens with an equivalent opportunity to exercise their right to vote, but must also provide perfect conditions under which such right is exercised. The equal protection clause does not require, for example, that California provide explanatory material (see Elec. Code § 3566) of varying degrees of complexity and sophistication even though the ability to comprehend an analysis of a technical ballot measure may vary widely among voters. Similarly, California is not required to adopt a bilingual electoral apparatus as a result of our decision today that it may no longer exclude Spanish literates from the polls. *The state interest in maintaining a single language system is substantial and the provision of ballots, notices, ballot pamphlets, etc., in Spanish is not necessary either to the formation of intelligent opinions on election issues or to the implementation of those opinions through the mechanics of balloting.* It reasonably may be assumed that newly enfranchised voters who are literate in Spanish can prepare themselves to vote through advance study of the sample ballots with the assistance of others capable of reading and translating them. . . ." 2 Cal.3d at 242. [Emphasis added.]

As mentioned previously, the only instance in which this Court has upheld a requirement that a local jurisdiction provide instruction in other than English is *Lau* v. *Nichols*, 414 U.S. 563 (1974), where the Court upheld U.S. Department of Health, Education and Welfare regulations issued pursuant to Title VI of the Civil Rights Act of 1964, requiring a school district receiving federal financial assistance to provide bilingual educational opportunities to minority language school children. Even if *Lau* continues to have vitality, it is not authority for the degree of intrusion into local elections called for by Title III and its interpretive guidelines. As Mr. Justice Douglas noted, the federal government was *not* attempting to dictate a particular remedy for this disadvantage:

> "No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation." 414 U.S. at 564-5.

The general requirement that San Francisco "apply its expertise" to remedying the disadvantage of non-English speaking children in the educational process is in stark contrast to the detailed requirements which

Congress has imposed through the 1975 Voting Rights Act Amendments. See the discussion at pp. 22-24, *supra*.

Elections, furthermore, do not involve young children. They do not involve persons who are the intended beneficiaries of federal financial assistance. Elections are infrequent. The contact of the minority language adult with the election system is not of long duration. It may not always be convenient, but it is not a great hardship for the elector to seek out his English-speaking contacts and support groups for assistance in registering or in casting his ballot.

These facts coupled with the fact that there are very few minority language citizens of voting age who do not have some ability in English, see the discussion at pp. 6-7, *supra*, make it clear that the line between what Congress can require of the elective process pursuant to Section 5 of the Fourteenth Amendment, and what is reserved to the States pursuant to the Tenth Amendment, should be drawn far short of permitting Congress to require the states and their political subdivisions to conduct totally multilingual elections.

For a recent affirmation of the principle that the Tenth Amendment articulates a constitutional limitation on Congress' power, see *National League of Cities* v. *Ussery*, 426 U.S. 833, 845-6 (1976). For federal appellate decisions rejecting the notion that the Equal Protection Clause requires states to administer their affairs bilingually, see *Frontera* v. *Sindell*, 422 F.2d 1215 (6th Cir. 1975) (civil service exam does not have to be conducted in Spanish for Spanish-speaking applicant); and *Carmona* v. *Sheffield*, 475 F.2d 738 (9th Cir. 1973) (California is not required to provide notices of rights under the unemployment laws in other than English).

For these reasons we respectfully contend that even if Congress has authority to require electoral aid for language minorities, it has far overstepped that authority in enacting Title III of the Voting Rights Amendment of 1975.

III. Even If The Fourteenth Amendment Empowers Congress To Require States And Political Subdivisions To Provide Multilingual Assistance To Voters, Congress Acted Arbitrarily And Thus Unlawfully When It Adopted Legislation Requiring A Local Jurisdiction To Provide *Written* Election Materials In A Foreign Language In The Event That The Illiteracy Rate Of Persons Deemed To Be Members Of That Language Minority Group (As A Group) Is Higher Than The National Illiteracy Rate.

Under 42 U.S.C. Section 1973aa-1a, a State or political subdivision must provide materials and information relating to the election process in a foreign language if more than 5% of its voting age citizens are members of that "language minority" *and* "if the illiteracy rate of such persons as a group is higher than the national illiteracy rate. . . ." "Illiteracy" is defined as the failure to complete the fifth primary grade in *any* school *anywhere*.

The method used by the Census Bureau to identify who is Chinese or Spanish is such that Chinese or Spanish-heritage persons are included in the count if they have a Spanish surname or believe themselves to be members of the Chinese race regardless of what language they speak.[32] It is a commonly known fact that in California there are substantial numbers of Chinese and Spanish heritage persons who can trace their families back *in California* for well over a century. Thus, the Census Bureau identification of persons as Chinese or of Spanish heritage includes an unknown but sub-

32. See footnote 4, *supra*, page 5.

stantial number of persons who do not need foreign language assistance to participate effectively in the electoral process.

Even more significant, the statutory measure of persons who are *illiterate* (*i.e.*, have not completed the fifth grade in *any* school) as a device to trigger the requirement that *written* election materials be provided in another language is absurd. It is obvious that the person who has failed to complete the fifth primary grade in *any* school is not likely to find election materials in *any* language to be of much assistance.

As a matter of law, therefore, the failure to complete the fifth primary grade in any school coupled with a Spanish surname or the identification of oneself as Chinese is *not* a rational basis for requiring a local jurisdiction to provide written materials in Spanish or Chinese. The only sound conclusion is that even if the Fourteenth Amendment empowers Congress to require State and political subdivisions to provide multilingual assistance to voters, Congress acted arbitrarily and thus in excess of its authority when it adoped legislation requiring the States and political subdivisions to provide multilingual *written* election materials on the basis of these criteria.

For the reasons stated, even if the Court concludes that Congress had the power to require States and their political subdivisions to provide multilingual assistance orally, the requirement that they provide written materals on a finding that the illiteracy rate of the particular language minority is higher than the national illiteracy rate should be declared unconstitutional.

IV. Congress Did Not Intend That A Jurisdiction Should Be Deemed To Have Violated The New Voting Rights Amendments When The Local Officials Were Acting In Good Faith But Had Not Had A Reasonable Time To Comply Fully With The New Law.

The District Court dismissed the complaint as "premature" because of its finding that the City was acting in good faith and was entitled to a reasonable time to come into compliance with the new multilingual requirements. In vacating this decision and remanding the case the Ninth Circuit reasoned as follows:

> "Shortage of time will not necessarily shield election officials from the diligent assertion of rights under the Act. It is Congress's intention to eradicate voting discrimination with all possible speed. *Briscoe* v. *Bell*, 432 U.S. 404, 410 (1977). The law imposes a duty on parties having grievances based on discriminatory practices to bring their complaints forward for pre-election adjudication. *Toney* v. *White*, 488 F.2d 310, 314 (5th Cir. 1973). Therefore, the complaint was not 'premature,' even though it may have been highly inconvenient. The city could have been protected by the conditions of any injunction from unreasonable or impossible burdens.
>
> * * * *
>
> "Because a federal claim based on a denial of voting rights has no deep common law roots, there is no well-defined common law defense of good faith to such a claim. Since good faith is not a defense to the violations alleged in this case, dismissal of the complaint on the ground of good faith was error." Appendix A, p. 2.

In stating that "[t]he city could have been protected by the conditions of any injunction from unreasonable or impossible burdens," the Ninth Circuit clearly assumed that the City had violated the new Voting Rights Amendments and that an injunction to direct the City officials in complying wih the amendments would be appropriate *notwithstanding* the fact that the City was acting in good faith and had not had a reasonable time

to comply fully with the recently imposed requirements. As described fully in the Statement of the Case, *supra*, the record in the instant case documents in exhaustive detail the procedures adopted on very short notice by the City and the many actions taken to bring the City into compliance with the multilingual election requirements at the earliest practicable time.

The ruling by the Ninth Circuit apparently assumes that Congress intended that, upon designation by the Director of the Census, a jurisdiction must comply *immediately* with the new multilingual requirements. Logically this would appear to be true even as to an election occurring the day after designation. This analysis assumes an irrational Congress, paints the City as a law violator even though it could not possibly have complied fully with the new law and leads to judicial control over the City's elections for no sound reason.

We contend that Congress intended no more than prompt, good faith and reasonable compliance with the new law, and that if it intended more than this it acted arbitrarily and in excess of its authority under Section 5 of the Fourteenth Amendment. If allowed to stand the Ninth Circuit decision will necessarily involve the federal courts in decisions very similar to those which have been recognized as beyond the purview of the federal courts unless discrimination in violation of the Fourteenth Amendment is established. See *Rizzo* v. *Goode*, 423 U.S. 362, at 643 (1976); *Millikin* v. *Bradley*, 418 U.S. 717 at 744 *et seq.* (1975); and *Mayor of City of Phila.* v. *Educational Equality League*, 415 U.S. 605, at 614 *et seq.* (1974).

Therefore, even if the constitutionality of Title III of the Voting Rights Act Amendments of 1975 is upheld, we urge the Court to reverse the decision of the Ninth Circuit and recognize, as did the District Court,

that Congress intended that jurisdictions making a good faith attempt to comply with the law be given a reasonable time to come into compilance with it.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this Court should grant the Petition for a Writ of Certiorari and set aside the decision of the Ninth Circuit Court of Appeals.

Dated: November 20, 1978.

Respectfully submitted,

GEORGE AGNOST
City Attorney

BURK E. DELVENTHAL
Deputy City Attorney

JUDITH L. TEICHMAN
Deputy City Attorney

Attorneys for Petitioners

APPENDIX A

United States Court of Appeals
For the Ninth Circuit

CHINESE FOR AFFIRMATIVE ACTION; SAN FRANCISCO COUNCIL, LEAGUE OF UNITED LATIN AMERICAN CITIZENS; LUE SHE TOM, TAK LAN CHAN HUEY, ROSE YUEN, NILSA M. MATOS, and of themselves and those similarly situated,

Appellants,

v.

LAWRENCE J. LEGUENNEC, individually and in his official capacity as Registrar of Voters, et al.,

Appellees.

No. 76-1517

OPINION

Appeal from the United States District Court for the Northern District of California

Before: GOODWIN and HUG, Circuit Judges, and PALMIERI,* District Judge.

GOODWIN, Circuit Judge:

Chinese and Spanish American minority plaintiffs appeal the dismissal without prejudice of their complaint seeking declaratory and injunctive relief for alleged violations of their rights under the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973 *et seq.*

The complaint alleged that the City of San Francisco failed to meet the requirements of the Act in city elections in November and December of 1975. Plaintiffs assert: (1) no action had been taken to provide voter

*The Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

registration materials and voter affidavits in any language other than English; (2) no multilingual ballots or voting machines were provided; (3) an unequal burden was placed on language-minority voters who desired election information.

The Act, in pertinent part, provides:

> "Prior to August 6, 1985, no State or political subdivision shall provide registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language if the Director of the Census determines (i) that more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and (ii) that the illiteracy rate of such persons as a group is higher than the national illiteracy rate. * * * " 42 U.S.C. § 1973aa-la(b).

On September 3, 1975, the Director of the Census designated San Francisco as a political subdivision covered by § 1973aa-la(b). On October 21, 1975, appellants filed their complaint.

The district court dismissed the action from the bench "as premature," adding that there was "no indication that the defendants are acting other than in good faith." The dismissal was based on the court's belief that the city was entitled to reasonable time to meet the requirements of the newly-enacted amendments.

The determination, in early September, that the city was subject to § 1973aa-la(b) left the city only a few days in which to make the contracts and accomplish the changes necessary to modify its election procedures to comply with the Act before the November elections. However, shortage of time will not necessarily shield election officials from the diligent assertion of rights

under the Act. It is Congress's intention to eradicate voting discrimination with all possible speed. *Briscoe* v. *Bell*, 432 U.S. 404, 410 (1977). The law imposes a duty on parties having grievances based on discriminatory practices to bring their complaints forward for pre-election adjudication. *Toney* v. *White*, 488 F.2d 310, 314 (5th Cir. 1973). Therefore, the complaint was not "premature," even though it may have been highly inconvenient. The city could have been protected by the conditions of any injunction from unreasonable or impossible burdens.

The city describes the district court's dismissal of the complaint on the grounds of good faith as "eminently reasonable." While good faith has an abstract element of equity about it, and may be a defense under some circumstances to an action brought under civil rights acts for *damages*, it is not a bar to an action for injunctive and declaratory relief. *Eslinger* v. *Thomas*, 476 F.2d 225 (4th Cir. 1973). Moreover, the good-faith defense is available only to the extent that the common law action based on the parallel tort so provides. *Williams* v. *Gould*, 486 F.2d 547 (9th Cir. 1973). Because a federal claim based on a denial of voting rights has no deep common law roots, there is no well-defined common law defense of good faith to such a claim. Since good faith is not a defense to the violations alleged in this case, dismissal of the complaint on the ground of good faith was error.

The city now asserts that actions taken since 1975 in regard to election procedures have rendered the case moot or "about to become moot." This action might indeed be considered moot if subsequent events have made it clear that the alleged violations could not reasonably be expected to recur. But the record before us sheds no light on the problem, and the city's own state-

ment of mootness cannot support an affirmance on that ground. *United States* v. *Concentrated Phosphate Export Association, Inc.*, 393 U.S. 199 (1968). The dispute over the elections of November and December 1975 is now moot, but the sufficiency of the city's current compliance with the Act is, or may be, a live, justiciable controversy "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), *quoted in Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). Only a trial court can answer the relevant questions.

Finally, both parties seek attorneys' fees. Title 42 U.S.C. § 1973*l*(e) permits this court, in its discretion, to allow attorneys' fees to the "prevailing party" in "any action to enforce the voting guarantees of the fourteenth and fifteenth amendment."

No issue on the merits has been finally determined in favor of any party. Any award of attorneys' fees can await the outcome of the action in the district court. When the prevailing party has been determined, the district court may consider in any award of attorneys' fees the effort expended in the appeal by the attorneys for the party that ultimately prevails.

Vacated and remanded.

APPENDIX B

United States District Court
Northern District of California

CHINESE FOR AFFIRMATIVE ACTION, ET AL., *Plaintiffs,* v. LAWRENCE J. LEGUENNEC, individually; FRANK R. QUINN, in his official capacity as Acting Registrar of Voters; CITY AND COUNTY OF SAN FRANCISCO, ET AL., *Defendants.*	No. C 75 2211 LHB ORDER DISMISSING ACTION

The Order of this Court of January 5, 1976, dismissing this action is hereby rescinded.

This action having come regularly on for hearing on December 19, 1975 before the Court on the San Francisco Defendants' motions to dismiss and for summary judgment; and

The attorneys for all parties having been heard, the Court having been fully informed on the issues, and the motions submitted:

The Court now finds as follows:

1. There has been no indication that defendants are acting in other than good faith; and

2. The public interest requires that defendants be given a reasonable period of time to meet the requirements of the law in a reasonable fashion; therefore,

IT IS HEREBY ORDERED that the complaint and the

action be and are hereby dismissed in their entirety without prejudice as to all defendants.

Dated: January 7, 1976.

LLOYD H. BURKE
UNITED STATES DISTRICT JUDGE

APPENDIX C

G. WILLIAM HUNTER
United States Attorney

AMANDA METCALF
Assistant United States Attorney

P.O. Box 36055
450 Golden Gate Avenue
San Francisco, California 94102
Telephone: (415) 556-6430

Attorneys for the Plaintiff

United States District Court
Northern District of California

UNITED STATES OF AMERICA,	*Plaintiff,*	C-78-2521-CFP CIVIL ACTION No.
v.		
CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; GEORGE R. MOSCONE, in his official capacity as Mayor of the City and County of San Francisco, ROGER BOAS, in his official capacity as Chief Executive Officer of the City and County of San Francisco; THOMAS P. KEARNEY, in his official capacity as the Registrar of Voters of the City and County of San Francisco,	*Defendants.*	COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF (CIVIL RIGHTS—VOTING 42 U.S.C. §1973) THREE JUDGE COURT

The United States of America alleges:

1. The Attorney General brings this action for declaratory and injunctive relief on behalf of the United States of America pursuant to 42 U.S.C. §§

1973a, 1973aa-la, 1973aa-2, 28 U.S.C. §2201, and the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

2. Jurisdiction is conferred by 28 U.S.C. 1345, and 2201 and 42 U.S.C. §1973aa-2. Venue is proper under 28 U.S.C. §1391(b).

3. This action requires the empanelling of a three-judge court to hear and determine the issues presented herein as provided by 42 U.S.C. §1973aa-2 and 28 U.S.C. §2284.

4. Defendant CITY AND COUNTY OF SAN FRANCISCO is a political subdivision of the State of California and is subject to the minority language provisions of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973aa-la.

5. Defendant BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO is the governing board of the City and County of San Francisco.

6. Defendant GEORGE R. MOSCONE is the Mayor of the City and County of San Francisco and as Chief Executive Officer of the City and County of San Francisco has supervisory authority over the Registrar of Voters and those matters within the purview of the Registrar.

7. Defendant ROGER BOAS is the Chief Administrative Officer of the City and County of San Francisco and has supervisory authority over the Registrar of Voters and those matters within the purview of the Registrar.

8. Defendant THOMAS P. KEARNEY is the Registrar of Voters for the City and County of San Francisco. Pursuant to the Charter of the City and County of San Francisco, Section 9.102, defendant KEARNEY is charged with:

> The conduct, management and control of the registration of voters, and of the holding of elections and of all matters pertaining to elections in the city and county. . . .

9. On August 6, 1975, the United States Congress enacted Public Law 94-73 (now codified as 42 U.S.C. §1973aa-la, et seq.) as an amendment to the Voting Rights Act of 1965, 42 U.S.C. §1973. This amendment explicitly recognized, and sought to eliminate forthwith, the existence of pervasive discrimination suffered in the United States by citizens who, as members of "language minority groups," were deprived of their right to vote.

10. 42 U.S.C. §1973aa-la(b) prohibits the use of "English language only" voting and registration notices, forms, instructions, assistance, ballots, and other related materials in jurisdictions targeted by the Director of the United States Census Bureau as having the statutorily specified percentage of voting age, language minority citizens. 42 U.S.C. §1973aa-la(b) provides that targeted jurisdiction shall be those states and political subdivisions which the Director of the United States Census Bureau determines to have more than five percent of their voting age citizens as members of a single language minority and that the illiteracy rate of such persons as a group is higher than the national illiteracy rate.

11. 42 U.S.C. §1973aa-la(c) provides, inter alia, that any registration and voting notices, forms, instructions, assistance, ballots and other materials relating to the electoral process provided in English by a state or political subdivision targeted by the Director of the United States Census and subject to the prohibition specified in 42 U.S.C. §1973aa-la(b) must also be provided in the language of the applicable minority group.

12. The standards of compliance for jurisdictions subject to the statutory requirements of 42 U.S.C. §1973aa-la in providing registration and voting materials and assistance for language minority citizens are set forth in 28 C.F.R. §55.1 et seq. The two basic standards are:

> (1) That materials and assistance should be provided in a way designed to allow members of applicable minority groups to be *effectively* informed of and participate *effectively* in voting-connected activities; and
>
> (2) That an affected jurisdiction should take all reasonable steps to achieve that goal.

28 C.F.R. §55.2(b) (emphasis added).

13. On September 9, 1975, the City and County of San Francisco became subject to the minority language provisions of the Act by virture of a determination by the Director of the United States Census Bureau, pursuant to 42 U.S.C. §1973aa-la(b), that more than five percent of San Francisco's citizen population were members of language minorities, specifically Chinese and Spanish, and that the illiteracy rate for each group was greater than the national rate.

14. Defendants have failed to conduct voter registration efforts in such a way as to provide language minority citizens an effective opportunity to register, and have thereby deprived language minority citizens in the City and County of San Francisco of their right to effective access to and use of minority language registration materials and assistance in violation of 42 U.S.C. §1973aa-la. Defendants have failed to comply with the requirements of said voting provisions for the general election of November 7, 1978 and all electoral processes thereafter.

15. Defendants have failed to recruit, hire and train

an adequate number of bilingual personnel in the office of the San Francisco Registrar of Voters to provide language minority citizens residing in San Francisco with effective oral assistance in the registration process and have thereby deprived language minority citizens of an effective opportunity to register to vote in violation of 42 U.S.C. §1973aa-la for the general election of November 7, 1978 and all electoral processes thereafter.

16. Defendants have failed to recruit, hire and train an adequate number of bilingual poll officials to provide language minority citizens with effective access to and use of minority language voting materials and assistance and have thereby deprived language minority citizens of their right to effective access to and use of such materials and assistance for the general election of November 7, 1978 and all elections thereafter in violation of 42 U.S.C. §1973aa-la.

17. Defendants have failed to effectively inform language minority citizens residing in the City and County of San Francisco of the availability of and have failed to provide effective access to minority language registration and voting materials and assistance, including but not limited to, ballots, for the general election of November 7, 1978, thereby depriving language minority citizens of their right to effective access to such materials and assistance in violation of 42 U.S.C. §1973aa-la.

WHEREFORE, the United States of America prays that this Court:

a. Enter a judgment declaring that defendants have failed to take reasonable measures to provide minority language voting and registration materials and assistance in such a way as to allow language minority citizens residing in the City and County of San Francisco

to be effectively informed of and effectively participate in the voting process for the general election of November 1, 1978 and all electoral processes thereafter, and have thereby violated the provisions of 42 U.S.C. §1973aa-la.

b. Issue a preliminary and permanent injunction requiring defendants to take any and all action necessary or appropriate to eliminate discrimination against language minority citizens residing in the City and County of San Francisco in the exercise of their right to vote, and to assure the full and fair exercise of their right to vote as required by the Constitution and statutes of the United States, such action to include, but not be limited to:

1. Recruitment of bilingual poll officials on a year-round basis through assignment of regular staff in the office of the San Francisco Registrar of Voters. Said recruitment efforts to be conducted through and with the cooperation and assistance of community groups in language minority communities, and to include development and publication of public service messages via English and minority language press, radio and television for the recruitment of such bilingual poll officials;

2. Development of a training program to instruct poll officials, both bilingual and monolingual, in the bilingual voting requirements of federal law, bilingual registration and voting procedures undertaken by the City and County of San Francisco in compliance with federal law, and approved methods of rendering effective assistance to language minority voters;

3. Establishment and use of accurate assessment procedures to measure bilingual language ability of bilingual poll officials and of minimal standards of speaking in the relevant minority language for such officials;

4. Development of a glossary of key election-related words in both English and the applicable minority languages and publication and distribution of said glossary to election officials prior to each election;

5. Establishment and advertisement of a telephone hotline for language minority citizens to provide information necessary to assist language minority citziens in registering and in exercising their right to vote;

6. Development of a voter registration outreach plan to actively register language minority voters which plan shall include: (1) establishment of a timetable for distribution and collection of registration forms, and related material, and (2) a procedure for identifying specific places in the community where registration forms should be distributed to effectuate said plan;

7. Establishment of a cooperative working relationship between the office of the Registrar and community groups in language minority communities for the development and implementation of voter outreach programs;

8. Provide community groups interested in voter registration, access to addresses of all unregistered residences;

9. Development of a comprehensive media campaign directed to language minority citizens to advertise all aspects of the voting process from registration to the casting of ballots which program emphasizes both the right to vote and the importance of voting;

10. Establishment of a task force under the supervision of the Chief Administrative Officer of the City and County of San Francisco to advise and assist the Registrar of Voters in complying with federal voting laws;

11. Establishment of effective measures for distribution of bilingual voting and registration ma-

terials to all language minority citizens of voting age;

12. Assignment of regular staff of the office of the Registrar of Voters to manage the development and implementation of tasks necessary to bring the City and County of San Francisco into compliance with 42 U.S.C. §1973aa-la;

13. Establishment of effective procedures to determine in advance of election day those language minority voters who require minority language assistance at polling places and establishment of procedures to insure that such assistance will be available when and where needed.

c. Authorize the appointment of Federal examiners pursuant to 42 U.S.C. 1973a(a) and 1973d to enforce the voting guarantees of the United States Constitution and Federal statutes in the City and County of San Francisco.

d. Grant such other and further relief as the Court deems appropriate together with the cost and disbursements of this action.

Dated: October 27, 1978.

GRIFFIN B. BELL
Attorney General

By: DREW S. DAYS III
Assistant Attorney General

G. WILLIAM HUNTER
United States Attorney

GERALD W. JONES
Attorney, Civil Rights Division
Department of Justice
Washington, D.C. 20530

AMANDA METCALF
Assistant United States Attorney